

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 15-81WES
	:	
WILSON ANDRES BOLIVAR-CORTES	:	

**REPORT AND RECOMMENDATION**

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant Wilson Andres Bolivar-Cortes is in violation of the terms of probation and, if so, for a recommended disposition. In compliance with that directive and in accordance with 18 U.S.C. § 3565(a) and Fed. R. Crim. P. 32.1, on July 6, 2018, Defendant was advised of the charges and ordered to be detained. On September 25, 2018, Defendant waived a violation hearing and admitted that he had violated the terms of his probation.<sup>1</sup> Based upon the following analysis and Defendant's admissions, I recommend that the Court impose a sentence of time served to be followed by a twelve-month term of supervised release. While on supervised release, I recommend that Defendant be required to comply with the following conditions:

**Defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office. Defendant shall contribute to the costs of such treatment based on ability to pay as determined by the probation officer.**

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<sup>1</sup> Defendant's admission was limited because the underlying state charges are still pending; specifically, he admitted only that the government has evidence sufficient to establish by a preponderance that Defendant committed the charged conduct.

**Defendant shall permit the probation officer, who may be accompanied by either local, state, or federal law enforcement authorities, upon reasonable suspicion of a violation of supervision, to conduct a search of Defendant's residence, automobile, and any other property under Defendant's control or ownership.**

**Upon notification of a warrant from immigration officials, Defendant must surrender to a duly authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, Title 8, U.S.C. Section 1101 et seq. and Title 18 U.S.C., Section 3583(d). Further, if deported Defendant shall remain outside of the United States, unless granted permission to re-enter by the Attorney General of the United States.**

## **I. BACKGROUND**

On March 29, 2018, the Court granted the Probation Office's petition for the issuance of a warrant charging Defendant with the following violation:

**Violation No. 1: The defendant shall not commit another federal, state, or local crime.**

On March 21, 2018, Mr. Bolivar-Cortes committed the offenses of Carrying a Pistol or Revolver without a License, Possession of a Firearm by an Alien, Possession of a Controlled Substance, Obstructing an Officer in Execution of Duty, and Driving without a License, as evidenced by his arrest by members of the East Providence Police Department on that day.

Based on Defendant's limited admission to the violation, I find that he is in violation of the terms and conditions of his probation.

## **II. APPLICABLE LAW**

Title 18 U.S.C. § 3565(a)(1) and (2) provides that if the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Fed. R. Crim. P. 32.1 and after considering the factors set forth in § 3553(a) to the extent that they are applicable, (1) continue the defendant on probation, with or without extending the term or modifying or enlarging the conditions or (2) revoke the sentence of probation and resentence the defendant under Subchapter A. However, the court

must consider the policy statement detailed in Chapter 7 of the United States Sentencing Guidelines (“USSG”). In this case, the statutory maximum term of imprisonment for the original offense is not more than ten years, and the maximum authorized term of probation that could have been imposed for the original offense is five years.

Section 7B1.1 of the USSG provides for three grades of violations (A, B and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) of the USSG provides that a Grade A violation constitutes conduct that is punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device, or any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year. Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or a violation of any other condition of supervision. Section 7B1.3(a)(1) states that upon a finding of a Grade A or B violation, the Court shall revoke probation. Subsection (a)(2) states that upon a finding of a Grade C violation, the Court may revoke, extend, or modify the conditions of probation. In this case, Defendant has committed a Grade B violation; therefore, the Court shall revoke probation.

Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(1) states that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of probation

with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term. Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(2) states that where the minimum term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (a) a sentence of imprisonment; or (b) a sentence of imprisonment that includes a term of probation with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one half of the minimum term is satisfied by imprisonment. The second provision, which allows for alternatives for one-half of the minimum term, applies to this matter.

Pursuant to § 7B1.3(d), any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. In this case, there is no outstanding restitution, fine, community confinement, home detention or intermittent confinement.

Pursuant to § 7B1.3(g)(1), where probation is revoked and a term of imprisonment is imposed, the provisions of §§ 5D1.1-1.3 shall apply to the imposition of a term of supervised release. Pursuant to 18 U.S.C. § 3583(b), the maximum statutory term of supervised release that can be imposed for a class A or B felony is five years, class C or D felony is three years and class E felony or class A misdemeanor is one year. Section 5D1.1(a) states that if a sentence of imprisonment of more than one year is imposed, the court shall order a term of supervised release to follow imprisonment. Subsection (b) states that the court may order a term of

supervised release in any other case. Section 5D1.2 states that if a term of supervised release is imposed, the length shall be between three and five years for a defendant convicted of a class A or B felony, between two and three years for a defendant convicted of a class C or D felony, or one year for a defendant convicted of a class E felony or class A misdemeanor. In this case, Defendant was convicted of a class C felony; therefore, the maximum statutory term of supervised release that may be imposed to follow imprisonment is three years. If a term of supervised release is to be imposed, the guidelines term shall be between two and three years.

Section 7B1.4(a) of the USSG provides that the Criminal History Category is the category applicable at the time the defendant was originally sentenced. In this instance, Defendant had a Criminal History Category of II at the time of sentencing.

Section 7B1.5(b) of the USSG provides that, upon revocation of probation, no credit shall be given toward any term of imprisonment ordered, for any portion of the term of probation served prior to revocation.

Should the Court revoke probation, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. In this case, Defendant committed a Grade B violation and has a Criminal History Category of II. Therefore, the applicable range of imprisonment for this violation is six to twelve months. Alternatively, the Court may sanction a violation of probation by resentencing in light of the range applicable at the time of the original sentence. In this case that was between one and seven months of incarceration.

### **III. ANALYSIS**

On August 4, 2016, Defendant pled guilty to knowingly making a false statement in an application for a passport. Based on a guidelines range of between one to seven months, he was leniently sentenced to three years of probation with conditions. As a citizen of Colombia, one of

Defendant's conditions was that, upon notice of a warrant from immigration officials, he must surrender for deportation. Probation commenced on August 4, 2016, with a projected expiration date of August 3, 2019.

For over a year and a half, Defendant complied with his probation conditions, including completion of over 150 hours of community service and attendance at mental health treatment at Codac. However, the positive trajectory arced abruptly downward with Defendant's arrest on March 21, 2018, by the East Providence police. Officers stopped the truck Defendant was driving because its registration was cancelled. The officers determined that Defendant did not have a valid driver's license, that he was carrying a Republica De Colombia identification card and that a full extradition warrant for his arrest was open in Houston, Texas. An inventory of the truck uncovered two Oxycodone pills in the driver's side door and a .45 caliber pistol loaded with thirteen rounds of ammunition in the center console.<sup>2</sup> Defendant was charged with carrying a pistol without a license, possession of a firearm by an alien, possession of a controlled substance, obstructing an officer in execution of duty, and driving without a license. This troubling set of offenses forms the basis for the petition.

The procedural events that followed Defendant's arrest are pertinent to what consequences should be imposed. Briefly, after his March 21, 2018, arrest in East Providence, Defendant was extradited to Houston, Texas, to answer a domestic charge. Meanwhile, on March 21, 2018, the Department of Homeland Security issued an immigration detainer based on Defendant's status as a removable alien ("ICE detainer"). And on March 29, 2018, this Court's warrant issued based on the probation violation petition. After Defendant was transported to Texas, on June 11, 2018, the Houston domestic case was dismissed and Defendant was

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<sup>2</sup> At the initial appearance, Defendant's counsel represented that the gun and ammunition belonged to Defendant's wife because she either had or was hoping to get a job as a security guard.

transferred into federal custody on this Court's warrant. Pursuant to Fed. R. Crim. P. 32.1, Defendant appeared in the Southern District of Texas; he was remanded into federal custody and was committed to the District of Rhode Island. He arrived in Rhode Island on July 6, 2018, and appeared initially to answer the probation violation charge. Because of the ICE detainer and the danger posed by the firearm, he was detained; a revocation hearing was set for July 24, 2018. After several continuances, the matter was finally set down for September 25, 2018.

As a result of these procedural events, Defendant has been in federal custody based on the charged probation violation since June 11, 2018; as of this writing, close to four months. Further, measured from when Defendant was arrested on March 21, 2018, he has continuously been in custody based on the conduct resulting in the charged violation for close to seven months. And the underlying state charges remain pending.

With this background, and giving Defendant credit for waiving a hearing and making a limited admission, the government recommended an incarcerative sentence in the mid-point of the guidelines range – eight months – to be followed by a twelve-month term of supervised release with the special conditions recommended by Probation, including that Defendant must surrender to ICE for removal proceedings. In making this recommendation, the government emphasized the seriousness of Defendant's possession of a loaded gun. While the government acknowledged that Defendant's family is now struggling with his wife's diagnosis with a very serious illness, it argued that such sad circumstances are beside the point, in that, as soon as Defendant is released from federal custody, he still has to face the ICE detainer and likely deportation, as well as the pending state charges. The government requested the twelve-month period of supervised release so that Defendant will be subject to supervision and violation proceedings if he returns to the United States after deportation.

Defendant asked the Court to impose a sentence of time served, which would give Defendant credit for the time he has spent in federal custody since June 11, 2018, and also would take into consideration that he has now been in jail for almost seven months since his March 21, 2018, arrest. Defendant pointed out that leniency would not be futile in that he may be eligible for relief from deportation because his father was executed in Columbia and his brother is a police officer there, and he may be able to resolve the state charges. Defendant emphasized that his wife is gravely ill and needs his help to care for herself and the children, including Defendant's two-year-old son. Defendant concurred with the government's proposal for a twelve-month period of supervised release following the term of incarceration. Defendant waived his right to allocution.

Based on Defendant's serious new conduct – driving an unregistered vehicle without a license and with Oxycodone in the driver's side door and a loaded pistol in the center console – a serious consequence is warranted. However, the Court is mindful that Defendant has already paid a terrible price, particularly in light of the reality that the guidelines range on the underlying crime was one to seven months. As a practical matter, a sentence of time served will come close to a total period of incarceration of eight months, if the period in custody is counted from his March 21, 2018, arrest. While release from federal custody may not end in Defendant's reunification with his family, I find that the unusually long period of time already served is enough to punish the breach of the Court's trust and to accomplish the sentencing goals of protection of the community and deterrence of new criminal conduct. Accordingly, I recommend that Defendant be sentenced to time served with a twelve-month term of supervised release follow.

#### **IV. CONCLUSION**



After considering the appropriate factors set forth in 18 U.S.C. § 3553(a) and for the reasons expressed above, I recommend that the Court impose a sentence of time served to be followed by a twelve-month term of supervised release. While on supervised release, I recommend that Defendant be required to comply with the following conditions:

Defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office. Defendant shall contribute to the costs of such treatment based on ability to pay as determined by the probation officer.

Defendant shall permit the probation officer, who may be accompanied by either local, state, or federal law enforcement authorities, upon reasonable suspicion of a violation of supervision, to conduct a search of Defendant's residence, automobile, and any other property under Defendant's control or ownership.

Upon notification of a warrant from immigration officials, Defendant must surrender to a duly authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, Title 8, U.S.C. Section 1101 et seq. and Title 18 U.S.C., Section 3583(d). Further, if deported Defendant shall remain outside of the United States, unless granted permission to re-enter by the Attorney General of the United States.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Crim. P. 59(b); DRI LR Cr 57.2(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan  
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PATRICIA A. SULLIVAN  
United States Magistrate Judge  
October 1, 2018